

1 **NOT FOR PUBLICATION**



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8 **UNITED STATES BANKRUPTCY COURT**

9 **CENTRAL DISTRICT OF CALIFORNIA**

10 **SAN FERNANDO VALLEY DIVISION**

11

12 In re

13 GAYLE A. TYDINGS-MONSOUR,

14 Debtor.

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16 GAYLE A. TYDINGS-MONSOUR,

17 Plaintiff,

18 v.

19 EMC MORTGAGE COMPANY, a

20 corporation, et al.,

21 Defendants.

Case No. SV 03-18319 MT

Chapter 13

ADV. No. 03-01446 MT

**MEMORANDUM OF DECISION**

Date: April 11, 2006

Time: 10:30 a.m.

Place: Courtroom 302

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23 I have before me three motions for summary judgment. First, there is Plaintiff's

24 motion for partial summary adjudication, which seeks a determination that the

25 nonjudicial foreclosure sale was void as a matter of law. Next, there is Tri County's

26 opposition to Plaintiff's motion for summary judgment, which I deem a counter-motion

1 for summary judgment pursuant to FRCP 56(c) (incorporated by FRBP 7056). Tri  
2 County seeks a determination that the nonjudicial foreclosure sale was valid as a matter  
3 of law. Third and finally, there is Quality Loan Service Corporations’s motion for  
4 summary judgment, in which Quality Loan Service seeks a determination that summary  
5 judgment must be granted on all claims against it as a matter of law.

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7 A. *Summary Judgment Standards*

8 In considering a motion for summary judgment, the court must view the evidence,  
9 and all justifiable inferences drawn from that evidence, in the light most favorable to the  
10 non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). “A  
11 party seeking summary judgment always bears the initial responsibility of informing the  
12 [court] of the basis for its motion, and identifying those portions of ‘the pleadings,  
13 depositions, answers to interrogatories, and admissions on file, together with the  
14 affidavits, if any,’ which it believes demonstrates the absence of a genuine issue of  
15 material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, even  
16 though the moving party bears the initial burden of demonstrating the absence of a  
17 “genuine issue of material fact for trial,” the party opposing a motion for summary  
18 judgment may not rely on mere allegations or denials of the pleadings. *Anderson*, 477  
19 U.S. at 248, 256. Once the moving party has met its initial burden, the party opposing  
20 summary judgment must present specific facts showing that there is a genuine issue for  
21 trial. *Id.* at 248. If the non-moving party fails to make a showing sufficient to establish  
22 the existence of an element essential to the party’s case, on which the party would bear  
23 the burden of proof at trial, the court may grant summary judgment against that party.  
24 *See Celotex*, 477 U.S. at 322.

25 In viewing the evidence submitted by the parties, there do not appear to be many  
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1 disputed facts as to issues under consideration in the motions for summary judgment.  
2 The following are the facts are undisputed or unopposed either through silence or failure  
3 to submit any documentary evidence to counter such evidence.

4 In 1989, Gayle Tydings-Monsour purchased her home at 3130 Sleepy Hollow  
5 Street, Simi Valley, California. In 1998, Plaintiff refinanced her mortgage and a new  
6 trust deed was recorded on the her home. In 2001, EMC Mortgage Company (EMC)  
7 acquired the note and trust deed. By this time, Plaintiff had failed to make nine  
8 successive mortgage payments. EMC recorded a notice of default and posted a notice  
9 of sale. On the day before the published sale of the property in March 2002, Plaintiff  
10 entered a forbearance agreement with EMC, which caused the sale to be continued  
11 month to month as payments were received. The agreement provided that Plaintiff  
12 must make an initial payment of \$5,600 and then successive monthly payments of  
13 \$1,700, followed by a lump sum payment to pay off the remaining default. The  
14 agreement did not state what the lump sum or balloon payment was to be. Plaintiff paid  
15 \$26,100 in thirteen separate payments under the forbearance agreement, all payments  
16 except the balloon payment. As each payment was received, the sale was postponed.

17 Despite numerous phone calls and inquiries, EMC failed to inform Plaintiff of  
18 what the lump sum payoff amount was. EMC informed Plaintiff that they wished to  
19 enter into a new forbearance agreement with her, but that this would take up to six  
20 weeks for the paperwork to be processed. On May 16, 2003, not having heard  
21 anything, Plaintiff sent a \$1,700 "good faith" payment to EMC.

22 Meanwhile, on May 9, 2003, EMC had instructed the trustee, Quality Loan  
23 Services Corporation (QLS), to conduct the sale. On May 20, 2003, EMC sent sale  
24 instructions to QLS. However, on May 16, 2003, EMC had also instructed QLS to  
25 continue the sale to May 23, 2003. QLS did not continue the sale and, on May 21,  
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1 2003, sold Plaintiff's home to Tri County Investments (TCI) for \$215,000. This appears  
2 to have left approximately \$40,000 in equity to be returned to Plaintiff upon resolution of  
3 this case. Plaintiff states that she learned of the sale to TCI when a three day notice to  
4 quit was posted on her property.

5 On May 22, 2003, QLS advised EMC of the sale, and requested confirmation as  
6 to the validity of the sale. EMC advised QLS that despite attempts by EMC to reach  
7 agreement with Plaintiff to address the arrears on the loan, no agreement was reached.  
8 EMC was of the position that the sale was valid, and based on that representation, QLS  
9 issued a Trustee's Deed Upon Sale to the highest bidder, TCI.

10 EMC returned the Plaintiff's last \$1,700 payment to her following the sale,  
11 advising her that it was not enough to bring her account current and to call the customer  
12 service department to discuss how to bring the account current.

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14 B. *Bank of America v. La Jolla Group*

15 Plaintiff bases his main argument on *Bank of America v. La Jolla Group*, 129  
16 Cal.App.4th 706 (Cal. App. 2005). Having reviewed the papers filed in this case and the  
17 *La Jolla* opinion, I find that *La Jolla* deals with a narrow exception to the usual  
18 presumptions in foreclosure proceedings and does not control here.

19 There is a common law rebuttable presumption that a foreclosure sale has been  
20 conducted regularly and fairly. A successful challenge to the sale requires evidence of  
21 failure to comply with the procedural requirements for the foreclosure sale that caused  
22 prejudice to the person attacking the sale. See 4 Miller & Starr, Cal. Real Estate §  
23 10:210-211 (3d ed. 2000). QLS satisfied each of several statutory requirements in  
24 advancing the nonjudicial foreclosure sale.

25 The comprehensive statutory framework on nonjudicial foreclosure sales is  
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1 designed to: (1) provide the creditor/beneficiary with a quick, inexpensive and efficient  
2 remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful  
3 loss of the property; and (3) ensure that a properly conducted sale is final between the  
4 parties. See *Nguyen v. Calhoun*, 105 Cal. App. 4<sup>th</sup> 428, 440 (Cal. App. 2003). “[T]he  
5 Supreme Court has said that the Legislature intended to cover the entire subject area of  
6 nonjudicial foreclosures by statute and leave nothing for the courts.” *Residential Capital*  
7 *LLC, v. Cal-Western Reconveyance Corp.*, 108 Cal.App.4th 807, 825 (Cal. App. 2003).  
8 *La Jolla* must be read in this context.

9 In *La Jolla*, the trustors (debtors) defaulted on their loan. A Notice of Default, an  
10 Election to Sell under Deed of Trust, and a Notice of Trustee’s Sale were recorded.  
11 Four days before the sale, the trustors tendered payment at a branch of the beneficiary.  
12 A branch employee accepted the payment and reinstated the loan. However, the  
13 beneficiary never notified the trustee that the loan had been reinstated, and the  
14 foreclosure sale proceeded as planned. La Jolla Group II (the buyer at the sale)  
15 purchased the property. The trustee issued a Trustee’s Deed, which was promptly  
16 recorded. Five days after the deed was recorded, the trustee realized he made a  
17 mistake and that the sale should not have gone forward. The trustee recorded a notice  
18 of rescission of the Trustee’s Deed and tendered a refund check for the amount paid.  
19 When La Jolla Group II refused to accept tender, the trustee filed an action against it  
20 seeking cancellation of the Trustee’s Deed.

21 Applying these facts, *La Jolla* held that the sale was void. It based its holding on  
22 *Bisno v. Sax*, 175 Cal.App.2d 714 (Cal. App. 1959), which had held that “the tender and  
23 acceptance of a payment sufficient to cure a default on a loan secured by a deed of  
24 trust reinstated the loan and deprived the trustee of the power to foreclose.” *La Jolla*,  
25 129 Cal.App.4th at 711. Citing *Bisno*, *La Jolla* approved of the proposition that,  
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1 “[s]peaking generally, the acceptance of payment of a delinquent installment of principal  
2 or interest cures that particular default and precludes a foreclosure sale based upon  
3 such preexisting delinquency.” *Id.* Applying *Bisno* to the facts of its case, *La Jolla* held  
4 that “[i]f, after default, the trustor and beneficiary enter into an agreement to cure the  
5 default and reinstate the loan, no contractual basis remains for exercising the power of  
6 sale.” *Id.* at 712. Taking these holdings together, in order for the *La Jolla* exception to  
7 apply, there must be (1) a tender (2) of a payment sufficient to cure a default, (3)  
8 acceptance of that payment, and (4) reinstatement of the loan. Here, all four of these  
9 elements are missing. Thus, *La Jolla* is distinguishable and does not apply.

10 First, it is questionable whether EMC and Plaintiff entered into an agreement to  
11 cure the default. It instead, by its own terms, appears to be a mere “condition  
12 precedent to reinstatement of the Mortgage.” Looking at the language of the  
13 forbearance agreement, it becomes clear that the agreement specifically was not an  
14 agreement to cure. The agreement provides: (1) “This Agreement does not cure the  
15 default.”; (2) “If there is a foreclosure sale currently scheduled, the sale will not be  
16 canceled . . . . The sale will be postponed pursuant to mutual agreement of the parties  
17 while this Agreement is in process. The foreclosure process is only placed on HOLD. If  
18 the Agreement becomes defaulted, foreclosure proceedings will continue without  
19 additional notice to the Borrower. The foreclosure process will resume from the point  
20 prior to the execution of the Agreement.”; (3) “Borrower acknowledges that Lender is not  
21 required to either reinstate the mortgage obligation or to accept payment of arrears in  
22 installments, and entering into this Agreement is an accommodation to the Borrower.”  
23 This, taken together, can hardly be considered an agreement to cure, even though the  
24 agreement might ultimately lead to a later cure.

25 Even if the forbearance agreement were considered an agreement to cure, there  
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1 still was no tender of an amount sufficient to cure the default, acceptance of this  
2 amount, and reinstatement of the loan. Until there is a reinstatement of the loan,  
3 Plaintiff remains in default. As long as Plaintiff remains in default, EMC retains its  
4 power of sale. If EMC had the power of sale, the sale remains valid under *La Jolla*.

5 The fact that EMC may have made a mistake by failing to disclose the amount of  
6 the balloon payment does not change the fundamental fact that Plaintiff remained in  
7 default. (Whether there was a breach of a separate contract between EMC and Plaintiff  
8 will be determined at trial.) The loan is not suddenly made current by virtue of the fact  
9 that EMC failed to pass on information. There is nothing to suggest that after entering  
10 the forbearance agreement that EMC no longer had the contractual right under the  
11 Deed of Trust to foreclose. There was no apparent novation of the Deed of Trust.

12 Without a reinstatement of the loan, the sale is valid. There is a strong  
13 presumption in favor of the validity of nonjudicial foreclosure sales. For example, in  
14 *Moeller v. Lien*, 25 Cal.App.4th at 832, the court held that “[t]he conclusive presumption  
15 precludes an attack by the trustor on the trustee’s sale to a bona fide purchaser even  
16 where the trustee wrongfully rejected a proper tender of reinstatement by the trustor.”  
17 EMC’s failure to inform Plaintiff the amount of the balloon payment is analogous to  
18 wrongful rejection of a proper tender of reinstatement by the trustor. Had Plaintiff been  
19 informed of the balloon payment amount, had Plaintiff attempted to make this payment,  
20 and had EMC nonetheless wrongfully rejected this payment and proceed to foreclosure,  
21 the sale would still be valid under *Moeller*. Thus, the foreclosure sale here was valid.

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23 C. *Review of First Amended Complaint*

24 1. First Cause of Action - Declaratory Relief

25 Now, in addressing what has been disposed of by my reading of *La Jolla* and in  
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1 addressing arguments on the motion for summary judgment of QLS, I will go through  
2 each relevant cause of action of the First Amended Complaint.

3         The first cause of action is for declaratory relief and is against all Defendants. In  
4 this cause of action, Plaintiff seeks a judicial declaration that Plaintiff and Defendant  
5 Monsour are the rightful owners of the property and that the purported sale of the  
6 property was void. This cause of action is partly resolved by my analysis of *La Jolla*, in  
7 which I have determined that the sale was not invalidated by *La Jolla*. Plaintiff  
8 additionally argued that the sale was voidable because of procedural irregularities. I  
9 address each of these alleged irregularities below.

10         QLS adequately addresses all of the purported irregularities in its motion.  
11 Plaintiff only opposed QLS on one of these irregularities. As such, Plaintiff waived the  
12 right to assert any of the other irregularities. Plaintiffs arguments were that: (1)  
13 Defendant Monsour was entitled to notice of the nonjudicial foreclosure sale; (2) that the  
14 sale price was inadequate; (3) and the failure of EMC's predecessor in interest to obtain  
15 the consent of Defendant Monsour to the 1998 trust deed under which QLS purported to  
16 sell the property. Moreover, the argument that these are irregularities is not meritorious.  
17 Monsour was not entitled to notice under Civ. Code 2924b as only a certain statutorily  
18 defined list of people are entitled to notice and as he did not file a request for notice with  
19 the recorder's office. Next, unrebutted evidence has been presented that the sale price  
20 was for \$215,000 and that the fair market value was \$310,000. As a legal matter,  
21 based on the authorities cited in the briefs, I find as a matter of law that the sale price  
22 was not inadequate and there is no effect on the validity of the sale on the basis of the  
23 sale price. As to the third contention regarding acquiring the consent of Defendant  
24 Monsour, no legal authority was presented.

25         The debtor also alleges a series of postponements of the sale as an irregularity.  
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1 California Civil Code 2924g(c)(1) provides that “[t]here may be a postponement of the  
2 sale proceedings at any time prior to the completion of the sale at the discretion of the  
3 trustee, or upon instruction by the beneficiary to the trustee that the sale proceedings be  
4 postponed. There may be a maximum of three postponements of the sale proceedings  
5 pursuant to this subdivision. In the event that the sale proceedings are postponed more  
6 than three times, the scheduling of any further sale proceeding shall be preceded by the  
7 giving of a new notice of sale in the manner prescribed by Section 2924(f).” However, if  
8 the sale is postponed by mutual agreement of the trustor and beneficiary, there is no  
9 limit as to the number of times it may be postponed. Civ. Code 2924g(c)(2). I find that  
10 the sale was postponed each time by mutual agreement, with the exception EMC’s final  
11 request that the sale be continued.

12 The language of the forbearance agreement provides that “[t]he sale will be  
13 postponed pursuant to the mutual agreement of the parties while the Agreement is in  
14 process.” Under Civ. Code 1638, “The language of a contract is to govern its  
15 interpretation, if the language is clear and explicit, and does not involve an absurdity.”  
16 Here, the language plainly states that the parties mutually agreed that the sale be  
17 postponed. There is no additional requirement of time, date and place. It is not absurd  
18 not to include a time, date and place, and it is not absurd to prospectively give mutual  
19 assent to future continuances. Certainly, Plaintiff not only consented, but *expected* the  
20 sale to be continued each month she made a payment under the forbearance  
21 agreement. According to Black’s Law Dictionary, “consent” means “[a]greement,  
22 approval, or permission as to some act or purpose.” Clearly, Plaintiff approved that the  
23 sale be continued. There was no requirement, however, that she approve of the time,  
24 place and date. Imposing such a requirement would throw a monkey wrench into the  
25 whole statutory nonjudicial foreclosure scheme by giving debtors extra-statutory  
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1 leverage and bargaining power against their lenders.

2 Under the statutory scheme, had Plaintiff been interested in being notified of  
3 time, date or place, all she would have had to do is attend one of the several continued  
4 foreclosure sales to receive oral notice of the continuance pursuant to Civ. Code 2924g.  
5 This is all the statute requires. However, there is no evidence that Plaintiff was  
6 interested in the continued time, date and place or ever requested such information.  
7 The argument that more is required than what is provided for based on the plain  
8 meaning of forbearance agreement and the plain meaning the statute is unpersuasive.  
9 In short, the postponements did not count against the three maximum allowed  
10 postponements. There is no irregularity invalidating the sale.

11 In light of the above, summary judgment is granted on the first cause of action as  
12 to all Defendants.<sup>1</sup>

13  
14 2. Second Cause of Action - Quiet Title

15 Summary judgment is granted in its entirety as to all Defendants for the same  
16 reasons as stated in the discussion of the first cause of action.

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18 3. Third Cause of Action - Breach of Contract

19 No motion for summary judgment affects this cause of action. It survives as  
20 against EMC.

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24 <sup>1</sup> I should also note that, based on the facts submitted, including those  
25 submitted by Plaintiff, I find that Tri County is clearly a bona fide purchaser for value. See  
26 *Scott v. Kuhlmann*, 746 F.2d 1377 (9th Cir. 1984).

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4. Fourth Cause of Action - Promissory Estoppel

No motion for summary judgment affects this cause of action. It survives as against EMC.

5. Fifth Cause of Action - Breach of Statutory Duties

For the reasons stated above relating to whether the continuances were appropriate under the nonjudicial foreclosure statutes, summary judgment is granted on this cause of action in favor of QLS.

6. Sixth Cause of Action - Accounting

No motion for summary judgment affects this cause of action as against EMC. It survives as against EMC. However, as to QLS, summary judgment is granted. QLS has demonstrated that it is not in a fiduciary relationship with Plaintiff and does not fall into any of the case law categories under which an accounting cause of action is appropriate. Plaintiff has cited no authority to the contrary to rebut QLS's authorities. Summary judgment is granted in favor of QLS on this cause of action.

7. *Seventh Cause of Action - Declaratory Relief*

Under this cause of action, Plaintiff requests a judicial determination as to the interest of the Plaintiff and CitiFinancial, Monsour, Capital One Bank, Tri County, and the Sleepy Hollow Trust to the fund arising from the sale of the Property on May 21, 2003. No motion for summary judgment affects this cause of action. It survives as against each of these Defendants.

1 D. *Summation*

2 The above motions for summary judgment have substantially narrowed the  
3 scope of trial. The limited remaining causes of action are the third, fourth and sixth  
4 causes of action, which are all solely against EMC. There also is a seventh cause of  
5 action relating to the distribution of proceeds of the sale against several Defendants.

6 Plaintiff's stated intention to amend the First Amended Complaint to allege a  
7 claim for wrongful foreclosure, to the extent that such stated intention is a motion, is  
8 denied. Pursuant to Rule 15, an amendment of the First Amended Complaint is not  
9 appropriate at this stage of the proceedings. Even if it were allowed, based on the  
10 papers before me, it would be unlikely to assist Plaintiff very much because emotional  
11 damages are unlikely to be recoverable from a claim for wrongful foreclosure on these  
12 facts, although I have reserved a determination on that issue following litigation of other  
13 issues. Also, because the act that in fact caused Plaintiff harm was not actually the  
14 sale, but rather the issuance of the Trustee's Deed and because QLS was acting as an  
15 agent of EMC and issued the Trustee's Deed on instructions from EMC, it appears no  
16 claim for wrongful foreclosure would be actionable against QLS anyway. What we have  
17 left is really a two party dispute between EMC and Plaintiff as to liability for a breach of  
18 contract and related claims and a possible dispute over damages resulting therefrom.

19 These remaining parties and causes of action will proceed to trial. All parties that  
20 are parties to these remaining causes of actions should be prepared to discuss the  
21 previously scheduled trial dates at today's pretrial conference.

22  
23 DATED: April 12, 2006

\_\_\_\_\_  
/s/  
MAUREEN A. TIGHE  
United States Bankruptcy Judge

**CERTIFICATE OF SERVICE BY MAIL**

**APR 12 2006**

I certify that a true copy of this **ORDER** was served on \_\_\_\_\_  
to the parties listed below:

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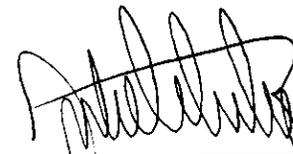
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Dated:

**APR 12 2006**



DEPUTY CLERK